SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1002, October Term, 1965

KNIGHT & WALL COMPANY, a Florida corporation; SPICOLA HARDWARE COMPANY, INC., a Florida corporation; YOUNKIN SPORTS SUPPLY, INC., a Florida corporation,

Petitioners

vs.

FARRIS BRYANT, Governor of Florida, TOM ADAMS, Secretary of State, RAY E. GREEN, Comptroller, JAMES W. KYNES, Attorney General, J. EDWIN LARSON, Treasurer, THOMAS D. BAILEY, Superintendent of Public Instruction, and DOYLE E. CONNER, Commissioner of Agriculture, as and constituting the State Revenue Commission, and J. ED STRAUGHN, as Director of the State Revenue Commission,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION TO POSITION FOR WRIT OF CERTIORARI

EARL FAIRCLOTH
Attorney General of the State of Florida

EDWARD D. COWART
Assistant Attorney General of the State of Florida

LARRY LEVY
Assistant Attorney General of the State of Florida

Attorneys for Respondents
The Capitol
Tallahassee, Florida

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JURISDICTION

Respondents accept the *facts* found under the heading "Jurisdiction" in petitioners' brief.

However, respondents would like to point out that Chapter 63-527, Laws of Florida, known as "The Wholesale Fishing and Other Equipment Act" is now found in Part II, Chapter 212, Florida Statutes.

Respondents oppose the granting of a writ of certiorari in the instant case for the reasons which will be set forth in argument.

QUESTIONS PRESENTED

Respondents accept the questions presented in petitioners' brief.

However, respondents feel that the questions presented can be better stated as follows:

QUESTION ONE

Whether or not the decision which was rendered by the Supreme Court of the State of Florida is in conflict with the principles established in prior United States Supreme Court decisions.

QUESTION TWO

Whether or not Chapter 63-527, Laws of Florida (Part II, Chapter 212, Florida Statutes) amounts to an unlawful delegation of legislative powers to the State Revenue Commission, because such powers are so vague, incomplete and uncertain that they do not afford the proper guidelines for the State Revenue Commission to follow.

QUESTION THREE

Whether or not Chapter 63-527, Laws of Florida (Part II, Chapter 212, Florida Statutes) violates the due process and equal protection of law clauses in the Florida and the United States Constitutions.

QUESTION FOUR

Whether or not Chapter 63-527, Laws of Florida, (Part II, Chapter 212, Florida Statutes) which contains a penal provision, is so vague or indefinite as to not apprise a person of his rights and obligations thereunder.

STATUTE INVOLVED

The statute involved is Chapter 63-527, Laws of Florida, now found as Part II, Chapter 212, Florida Statutes.

STATEMENT OF THE CASE

Respondents will accept the "Statement" as found in petitioners' brief, except as follows:

1. Respondents would like to point out that under (a) as found in petitioners' "Statement," the wording of the statute is as follows:

> At the rate of five percent (5%) of the sales *price* of each item of fishing, hunting, camping, swimming and diving equipment sold at wholesale in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state and to include each and every wholesale sale.

Petitioners had erroneously used the word tax, rather than price.

2. Under (b) found in petitioners' "Statement," it should read as follows:

> At the rate of five percent (5%) of the cost price of each item of fishing, hunting, camping, swimming and diving equipment purchased, imported, or caused to be imported into this state for resale, unless the purchaser thereof can prove that the tax levied by Part II of this Chapter has been paid to his *supplier* or vendor.

3. Section 6 (f) as quoted at page 6 of petitioners' brief is incorporated in Part II of Chapter 212, Florida Statutes, as follows:

> "Part II of this Chapter shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial productions of fish and other marine life, and such nets and gear are exempted from payment of the tax herein proposed."

SUMMARY

The respondents' position taken in the following argument can be summarized in the following manner:

The respondents will show in their argument that Chapter 63-527, Laws of Florida, (Part II, Chapter 212, Florida Statutes) is not uncertain, vague, nor indefinite. Respondents will clearly show that the legislature has established definite guidelines which are to be utilized by the State

Revenue Commission in the administration of this act.

Respondents will further show in argument that the act which contains a penal provision is not so vague, indefinite, nor uncertain as to fail to apprise men of common intelligence what act or acts may constitute violation of the act. In this connection, respondents will show that the test as established in International Harvester Co. v. Kentucky, 234 U. S. 216, 1914, 34 Sup. Ct. 853, 58 L. Ed. 1284, is met.

Respondents will further show that the act is not discriminatory in any manner and that all the exemptions found therein are based upon a reasonable classification.

In connection with what has been stated in the previous three paragraphs, the respondents will show that the decision reached by the Supreme Court of the State of Florida is entirely in keeping with decisions which have been reached by the United States Supreme Court, and that the principles utilized by the Supreme Court of the State of Florida in reaching its decision are consistent with principles which have been established by the United States Supreme Court.

Respondents will show that there has been no violation of the due process and equal protection of law clauses found in the Constitutions of the United States and the State of Florida.

ARGUMENT

Respondents respectfully submit that the decision reached in this case by the Supreme Court of the State of

Florida is entirely in keeping with previous decisions reached by the United States Supreme Court covering similar situations.

Respondents further submit that the principles utilized by the Supreme Court of the State of Florida in reaching its decision are entirely consistent with principles which have previously been established by the United States Supreme Court.

Initially, it should be pointed out that the Florida Constitution is not a grant, but is a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the constitution of the state or nation. *Cotten et al., v. Co. Commissioners of Leon Co. et al.,* 6 Fla. 610, 1856; *Savage v. Board of Public Instruction,* 101 Fla. 1362, 133 So. 341, 1931; *Neilsel v. Moran,* 80 Fla. 98, 85 So. 346, 1919; *Board of Public Instruction v. Gillespie,* C.C.A., 1936, 81 F. (2d) 586. This means that the legislature may enact any laws which are not forbidden expressly or inferentially by the Florida Constitution, so long as the requirements of due process and equal protection are met.

The right to tax, of course, is an inherent power of sovereignty. Consequently, since the Florida Constitution is a limitation of power, and since it does not expressly or inferentially say that the legislature may not impose a tax on certain sporting equipment as defined in Part II, Chapter 212, Florida Statutes, this means that so long as the requirements of due process and equal protection are met, the legislature may impose such a tax as is found in Part II, Chapter 212, Florida Statutes.

Petitioners allege that the act is so vague, incomplete and indefinite that it cannot be executed. Petitioners further state that, due to such vagueness and incompleteness, the act fails to state proper guidelines so as to clearly set forth what is to be done, by the administering agency, the State Revenue Commission.

In effect, what the petitioners are alleging on this point is that the act comprises an improper delegation of legislative authority.

While powers appertaining exclusively to the legislative department cannot be lawfully delegated, this does not mean that the legislature is wholly powerless to delegate some powers and authority to other governmental agencies. Although the legislature may not delegate the power to enact a law, or to declare what the law shall be or to exercise an unrestricted discretion in applying the law, the legislature may enact a law that is complete in itself and authorize designated officials within definite limitations to provide rules and regulations for its complete operation and enforcement. See *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 1919; *State v. Florida State Turnpike Authority*, Fla., 80 So. 2d 337, 1955, at 346.

In *Campoamor v. State Live Stock Sanitary Board*, 136 Fla. 451, 182 So. 277, 1938, the Supreme Court held valid an act of the legislature delegating authority to a governmental agency to promulgate rules and regulations as were necessary to detect, control, and suppress contagious diseases of domestic animals and such rules and regulations may be remedial and penal.

Let us now apply these above stated principles to the present act in question to determine whether or not the act does supply sufficient guidelines to the State Revenue Commission within which the State Revenue Commission can effectually promulgate rules and regulations.

The respondents respectfully submit that the legislature in the act has set very definite guidelines and standards.

The petitioners have admitted that they sell fishing, hunting, camping, swimming and diving equipment.

The act commences by imposing a tax on certain sales, uses, and storages of fishing, hunting, camping, swimming and diving equipment. Here the legislature is beginning to establish its first guideline.

In Section 212.52, Florida Statutes, the delineating of guidelines continues. Therein it is stated at subsection (3): "Fishing, hunting, camping, swimming and diving equipment means and includes any device, implement, tool, article, or object customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of fishing, . . ."

This clearly appears to further delineate definite guidelines within which the State Revenue Commission is to promulgate rules and regulations in the furtherance of the purposes as set forth within the act.

At this point, the legislature has not only used general, ordinary and everyday words, describing articles which

are to be taxed, but has gone even further by pointing out that devices, implements, tools, etc., which are *customarily or primarily* used in the furtherance of recreational pursuits are to be taxed. This appears to express very clearly that it is not items or implements which are *not* customarily or primarily used in recreational pursuits which should be taxed. By use of the words customarily or primarily, the legislature has clearly shown that it is not the incidental nor extraordinary use which is to determine its taxability. By use of the phrase, "recreational pursuit," the legislature has clearly shown that it does not intend to impose a tax on items which are used for *commercial* pursuits. This is of course entirely in keeping with the overall purpose of this tax which was to provide funds which are to be utilized in the expansion of recreational facilities within the State of Florida. However, the legislature has not stopped there in establishing guidelines which are to be followed by the State Revenue Commission.

Further in Section 212.52(3), Florida Statutes, the legislature has specifically spelled out what type items and implements are to be subject to the tax. Therein it is stated:

> ". . . lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunitions, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits, water skis, tow ropes, fins, bathing and swimming suits, underwater spears, spear guns, and similar related, or like items, . . ."

Thus we see the tremendous effort which has been exercised by the legislature in clearly circumscribing the act so that the State Revenue Commission is afforded with proper guidelines within which to promulgate rules and regulations.

The respondents respectfully submit that the legislature's efforts in clearly setting forth guidelines to be utilized by the State Revenue Commission are more than what were actually needed. The guidelines are clear. They are not vague, uncertain, nor indefinite. Not only are the general subjects to be taxed clearly set forth, but the legislature has gone even further by providing specific examples as to what similar objects and implements are to be taxed. In those situations where an item may be used for both recreational and other purposes, the legislature has clearly stated that it is the *customary* and *primary* use not the *incidental* nor *extraordinary* use which is to be the determining factor.

In this respect, it should also be remembered that the tax shall be due at the moment of the transaction. Section 212.53(3), Florida Statutes, provides:

> "The full amount of the tax on credit sales, installment sales, and sales made on any kind of deferred payment shall be due at the *moment of the transaction* in the same manner as a cash sale." (Emphasis supplied.)

This clearly rebuts one argument which has been advanced by the petitioners, since it clearly shows that the

use to which the item is *ultimately* put is *not* to be the test. Rather, the wholesaler is to determine at the moment of the transaction whether or not an item is such that is customarily or primarily used for recreational pursuits. It matters not that the item sold may be actually used for some purpose other than that for which it was customarily or primarily intended to be used. This means that the wholesaler does not have to guess how the item is actually going to be used. For instance, if a fishing pole is sold, obviously the customary or primary use of a fishing pole would be for fishing purposes. However, it is common knowledge that fishing poles are occasionally used to thrash pecans out of trees. However, the fact that the fishing pole may ultimately be used for such purpose would have no effect on the taxability or nontaxability of the item. It is the customary or primary use which is to control; not the incidental use.

Respondents respectfully submit that the act is not vague, uncertain, nor indefinite. The act does set forth very definite guidelines and standards. Consequently, there is no improper delegation of legislative authority. For the reasons which have been previously stated respondents respectfully submit that the petitioners argument that they are unable to tell on what items the tax is to be charged is without foundation. Petitioners appear to argue that since they do not know how the item will ultimately be used they are unable to determine whether or not the item is taxable. As previously pointed out, the tax is due at the moment of transaction and the ultimate use it not the test.

It is stated in *Brock v. Hardie*, Fla., 154 So. 690, 1934, at page 695:

> "It was said in Orient Ins. Co. v. Daggs, 172 U.S. 557, 19 S. Ct. 281, 43 L. Ed. 552, that it was sufficient to satisfy the demand of the Constitution if a classification was practical and not palpably arbitrary. In classifying persons and things upon whom and on which the law shall operate to include them in its privisions or exclude them therefrom the Legislature is not confined to minute consideration of the distinction which may arise from accidental circumstances. There is no precise application of the rule of reasonableness of classification. *There cannot be an exact exclusion or inclusion of persons or things.* Louisville & N. R. Co. v. Melton, 218 U.S. 36, 30 S. Ct. 676, 54 L. Ed. 921, 47 L.R.A. (N. S.) 84." (Emphasis supplied.)

Respondents respectfully submit that there cannot be an exact exclusion or inclusion of persons and things within such an act. However, the fact that there is not an exact exclusion or inclusion should certainly be no reason for declaring the entire act unconstitutional.

The act clearly sets forth definite guidelines which can be utilized by the State Revenue Commission in determining what similar or like items are to be subject to the tax.

The petitioners make a great deal over the words, *customarily* or *primarily*, as found in the act and appear to argue that they are never able to determine what is the customary or primary use of a particular item.

Respondents respectfully submit that the legislature, in enacting the act, has provided these additional *modifying* words so as to clearly apprise the petitioners and others in like position of the fact that it is not the incidental use to which an item may be put which is to determine its taxability. As previously pointed out, the act specifically enumerates certain items which are to be taxed. Respondents submit that any reasonable person with ordinary intelligence should certainly be able to determine the taxability or nontaxability of an item from the numerous criteria which have been set forth in the act itself.

The respondents respectfully submit that the act is neither vague, indefinite, nor uncertain in any manner whatsoever. Respondents further submit that the petitioners by the clear wording of the act itself are fully apprised of what items are and what items are not to be taxed.

Petitioners contend that the act violates the Fourteenth Admendment of the Federal Constitution. The basis for the petitioners' contention appears to be that there is no reasonable basis for exempting any of the items listed by the act. In effect, this attacks the reasonableness of the classification of the items which are to be taxed. In this connection, respondents respectfully point out what is stated in *Brock v. Hardie,* Fla., 154 So. 690, 1934, at page 695:

> "The Fourteenth Amendment does not strip the state of its power to exert its lawful police power. The power to classify is not taken away by the operation of the equal protection clause; therefore a

> wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, text 294, 18 S. Ct. 594, 42 L. Ed. 1037, text 1043."

Bearing in mind that the legislature is to be given a wide latitude in determining what items are to be taxed and what items are not to be taxed, and further keeping in mind the fundamental principle that the state constitution is a limitation of power, not a grant of power, let us now consider the act in question.

Initially we see that the legislature has determined that there is a need for taxes so as to provide funds for the enlargement of present state recreational facilities. Next we see that the legislature has determined that the brunt of such tax should be borne by persons who are most likely to receive the benefits from such enlargment of recreational facilities. This act appears to be entirely reasonable and just. The legislature has provided certain exemptions. It is these exemptions which the petitioners claim are not based upon a proper classification. Certain exemptions are found in Section 212.52(3), Florida Statutes, wherein it is stated:

> ". . . provided that fuels, oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines, and parts for boats and watercraft, devices or articles designed or utilized primarily as lifesaving, safety, or first aid equipment, and articles of

clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition."

Initially we note that fuels, oils, and lubricants are generally subject to other taxes, for instance, gasoline taxes. Next let us remember that were all fuels etc., to be taxed this would seem to be contrary to that which was previously stated in the act that it is the customary or primary use which is to determine the taxability. It would further place an unreasonable burden on one imposing the tax since there is obviously no way that a person imposing a tax can determine the ultimate use to which an object is to be put. Most fuel is, of course, utilized in motor vehicles on the highways. Therefore, should a tax have been imposed on such items, the result would have been that the incidental use of the item rather than its customary or primary use might have become a criterion. In this connection, it should also be remembered that it is items which are used for recreational pursuits which are being taxed. Consequently, it appears entirely reasonable that the legislature has seen fit to exempt fuels, oils, lubricants, motor vehicles, etc. from the burden of the tax. It should also be remembered that motor vehicles as defined by Florida law are subject to a license tax which is to be in lieu of all other property taxes. The respondents respectfully submit that the legislative determination of the classification of the items sought to be exempted from the imposition of the tax should be conclusive.

Next we note that the legislature has exempted life saving and safety equipment. This appears to be entirely

reasonable. It may well be that the legislature did not wish to burden items which were used in the saving of human lives and the advancement of the public health, public safety and public morals with the imposition of the tax. It should be pointed out that the purpose of such life saving and safety equipment is not for recreational pursuits, but is rather for the very necessary purpose of saving lives. Respondents respectfully submit that this too is a clear distinguishable and proper classification.

At first glance, it may appear that the exemption of articles of clothing or apparel other than bathing, swimming or diving suits might present some ambiguity. However, when viewed in light of other wording found in the act, no such ambiguity is manifested. It must be remembered that the tax is for the purpose of raising funds for enlarging *recreational* facilities. Most wearing apparel is worn primarily for the purpose of providing warmth and because it is a necessary custom which must be complied with in our society. Granted that certain types of wearing apparel are worn solely for sporting activities, generally wearing apparel is worn for the previously stated purposes. In this respect, we must remember that the act specifically says that it is those items which are customarily and primarily used for recreational pursuits which are to be taxed. Although some wearing apparel may *incidentally* be used in recreational pursuits, the incidental use is not the test. On the other hand, bathing, swimming and diving suits are items which are definitely customarily or primarily used in recreational pursuits. There is a

valid distinction between ordinary wearing apparel and bathing, swimming or diving suits.

Respondents respectfully submit that the exemption of the items which have been previously referred to even more clearly delineates to both the State Revenue Commission and persons situated like the petitioners what is and what is not considered as taxable.
Section 212.55(3)(f), Florida Statutes, provides:

> "Part II of this chapter shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for *commercial production* of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed." (Emphasis supplied.)

The petitioners argue that this, too, is an improper classification and that there is no valid reason for the distinction and the exemption of said articles as described in the above cited section.

Respondents respectfully disagree. In fact, respondents submit that such exemption is entirely in keeping with the purpose of this act. It clearly exempts items whose primary and customary use would be for commercial purposes, not recreational purposes. Petitioners appear to argue that the nets, seines, and gear referred to in said section can just as well be used for recreational purposes as they can for commercial purposes. Again the respondents would like to call to the court's attention that it is the customary or primary use which is to be the test, not

the incidental or extraordinary use. Occasionally an individual may indeed purchase a three hundred foot net such as is ordinarily used by commercial fishermen and use it for recreational purposes. However, the wholesaler is not held to account for the ultimate use to which the item is put, only for its customary or primary use as determined at the moment of the transaction.

Respondents submit that contrary to what is contended by the petitioners the inclusion of this exemption actually removes ambiguity by further showing that commercial pursuits are not to be taxed. This appears to be an entirely reasonable classification on the part of the legislature.

In conclusion, the respondents would like to again point out that which has been previously cited in this brief. In classifying persons and things upon whom and on which the law shall operate to include in its provisions or exclude them therefrom, the legislature is not confined to minute consideration of the distinction which may arise from accidental circumstances. There is no precise application of the rule of reasonableness of classification.

Respondents respectfully submit that the test of the reasonableness of the classification and reasonableness of the exemptions has been met. There is no violation of the Fourteenth Amendment of the United States Constitution.

Petitioners contend that since the act contains a penal provision, the language of the act is so vague and uncertain that it does not apprise them of what act or acts will or might result in their being guilty of a misdemeanor.

The test, as set forth in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284, is:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322, 1925, at page 328 it is stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, . . ."

Further in said opinion, at page 329, it is stated:

> "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature."

In the case of *United States v. Ragen*, 314 U. S. 513, 86 L. Ed. 383, 1941, it is stated:

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a ques-

tion of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

With the above stated principles in mind, let us consider the act. A penal provision found in Section 212.58, Florida Statutes, states:

"Violation of any provision of Part II of this chapter shall constitute a misdemeanor, and shall be punished as provided by law."

The petitioners take the position that the act is so vague and uncertain that they are unable to determine what act may subject them to the punishment as provided by the act.

Initially respondents would like to point out that the language used in the act is ordinary language and is not unduly technical. Such language would even be more clear to persons, such as the petitioners herein, who admit that they are engaged every day in the wholesale business of selling the equipment referred to in the act.

The respondents would respectfully point out that the act commences by placing a tax on certain sales, uses and storages of fishing, hunting, swimming and diving equipment. The act then goes further and defines what is meant by fishing, hunting, camping, swimming and diving equipment. The act then clearly points out that it is the customary or primary use which is to determine an item's taxability. Note, too, that the words used, that is, device, implement, tool, article or object are *not* technical words. The act then goes further by specifically enumerat-

ing certain items which are to be taxed, to wit, poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, etc. Then the act sets forth certain exemptions which are *not* to be included, to wit, fuels, oils, lubricants, motor fuels, and parts thereof . . . life saving, safety or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits. The act goes yet further and points out that nets, seines and gear used in connection with commercial fishing are not to be taxed.

The act has clearly defined dealer in Section 212.52, Florida Statutes. Since the petitioners admit that they are engaged in selling at wholesale fishing, hunting, camping, swimming and diving equipment, it is respectfully submitted that the petitioners have brought themselves squarely within one of said definitions, to wit,

> "(c) Every person who sells at wholesale or offers to sell at wholesale, or who has in his possession for sale at wholesale, for use, or for storage fishing, hunting, camping, swimming and diving equipment; . . ."

The act sets forth in said Section 212.52, Florida Statutes, Definitions, what is a sale at wholesale, sale at retail, and defines sales price, storage and use. The act further clearly sets forth the rate of the tax, and the basis to which the rate is to be applied and the fact that the tax is due at the moment of the transaction. It is this act and all of these provisions which have been previously mentioned which the petitioners contend are so vague and indefinite

that men of common intelligence must guess at its meaning. Respondents respectfully submit that this contention is without foundation.

Petitioners could scarcely be heard to argue that men of common intelligence are incapable of determining what the word "fuels" means. Petitioners could scarcely be heard to argue that men of common intelligence are incapable of determining what fishing, hunting, camping, swimming and diving equipment is considered to be, particularly in light of the specific enumeration of certain items and the specific exemptions of other items which are contained in the act.

Petitioners could hardly be heard to argue that men of common intelligence are incapable of determining what a device, implement, tool, article or object is.

Consequently it appears that the test set forth in the *International Harvester Company* case, supra, has been more than adequately met.

True, where items are sold which are not specifically enumerated in the act, the wholesaler is called upon to make a determination as to the taxability of such items by reference to the criteria which are established in the act, that is, the customary and primary use is to be one criterion, recreational as opposed to commercial or vocational is to be another criterion.

However, in addition, in making this decision, he has before him, besides the specifically enumerated items which clearly indicate the type of sporting equipment

which is to be taxed, the exemptions of certain specific items which clearly set forth what is not to be taxed.

Respondents call to the court's attention that which is stated in *Nash v. United States*, 229 U. S. 373, 1913, at page 377:

> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Commonwealth v. Pierce*, 138 Massachusetts, 165, 178. *Commonwealth v. Chance*, 174 Massachusetts, 245, 252. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See *Reg. v. Desmond*, and other illustrations in Stephen, Dig. Crim. Law, art 223, 1st ed., p. 146. If he did no

more than drive negligently through a street he might get off with manslaughter or less. *Reg. v. Swindall,* 2 C. & K. 230; *Rex v. Burton,* 1 Strange 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See *The Germanic,* 196, U. S. 589, 596."

Respondents respectfully submit that the act is not vague, uncertain or indefinite. Respondents submit that the test as set forth in the *International Harvester Company* case, supra, has been met.

CONCLUSION

In conclusion, the respondents would respectfully like to call to the court's attention certain fundamental rules of construction which are of import in considering the instant case.

The State Constitution is a limitation of power, not a grant of power. Consequently all that which is not expressly prohibited by the State Constitution and which is not in conflict with the Federal Constitution is solely within the discretion of the legislative authorities. An act of the legislature should never be stricken down if there is any reasonable theory on which it can be upheld. It is the duty of the courts to so construe legislation as to save it from constitutional infirmities. *Seaboard Air Line R. Co. v. Watson,* 103 Fla. 477, 137 So. 719, app dismd, 287 U. S. 86, 77 L. Ed. 180, 53 Sup. Ct. 32, 86 A. L. R. 174, 1932.

In deference to a co-ordinate branch of the government, the judiciary should never nullify a statute except in a case free from doubt. *Cotten, et al., v. Co. Commissioners of Leon Co., et al.,* 6 Fla. 610, 1856. The presumption of constitutionality of statutes continues until the invalidity of an enactment is shown to be free from doubt or, as otherwise expressed, beyond all reasonable doubt or beyond a rational doubt. *Ex Parte Messer,* 87 Fla. 92, 99 So. 330, 1924; *Board of Com'rs v. Forbes Pioneer Boat Line,* 80 Fla. 252, 86 So. 199, 1920 Revd on other grounds, 258 U. S. 338, 66 L. Ed. 647, 42 Sup. Ct. 325.

Respondents respectfully submit that the act is not vague, uncertain or indefinite. Respondents submit that the test as set forth in the *International Harvester Company* case, supra, has been met.

Respondents submit that the act does not violate the Fourteenth Amendment of the United States Constitution that the act clearly sets forth definite guidelines to be utilized by the State Revenue Commission; that the guidelines set forth are clear and definite and not uncertain; and that the act, which contains a penal provision, does adequately apprise men of common intelligence what acts would constitute a violation of Part II of said Chapter.

Respondents further submit that the case was properly decided by the Supreme Court of the State of Florida, and that the decision is not inconsistent with decisions which have been reached by the United States Supreme Court on similar points; and that the principles utilized

by the Supreme Court of the State of Florida are principles which are consistent with those utilized by the Supreme Court of the United States.

Respondents respectfully submit that there is no need for the granting of a writ of certiorari in the instant case.

Respectfully submitted,

EARL FAIRCLOTH
Atorney General of the
State of Florida

EDWARD D. COWART
Assistant Attorney General
of the State of Florida

Attorneys for Respondents
The Capitol
Tallahassee, Florida